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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1940

## No. 983

DOROTHY BRUNET,

*Petitioner,*

*vs.*

S. S. KRESGE COMPANY, a corporation,

*Respondent.*

## REPLY BRIEF OF PETITIONER IN SUPPORT OF WRIT OF CERTIORARI.

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## REPLY BRIEF OF PETITIONER IN SUPPORT OF WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

### STATEMENT OF FACTS

The petitioner stated the facts and the law of the case at bar clearly in her Petition for Writ of Certiorari and had hoped to avoid the presentation of a Reply Brief. However, in view of the fact that the Respondent's Brief contains definite misstatements as to procedural facts, the petitioner believes that a Reply Brief should be presented to this Honorable Court to call the Court's attention to the true facts in the case.

At the *conclusion of the plaintiff's evidence,* the defend-

ant made a motion for a directed verdict, on which motion the ruling was reserved. At the *end of all of the evidence introduced by both plaintiff and defendant,* the defendant made a motion for a directed verdict, which motion was denied. The case, therefore, went to the jury after the defendant's motion for a directed verdict had been *denied without reservation.*

We quote from page 130 of the Transcript of Record to show to this Honorable Court the true procedural facts of the case:

> "Now comes the defendant, S. S. Kresge Company, a corporation, by Burt A. Crowe, its attorney, at the conclusion of all the evidence offered by the plaintiff in the above entitled cause and moves the court to exclude said evidence and to instruct the jury to find the defendant not guilty as per the written instruction attached hereto.
>
> (Written notation) Ruling Reserved
>
> Burt A. Crowe,
>
> Attorney for Defendant"

* * * * *

> "Now comes the defendant, S. S. Kresge Company, a corporation, by Burt A. Crowe, its attorney, at the conclusion of all the evidence offered by the plaintiff and the defendant in the above entitled cause and moves the Court to exclude said evidence and to instruct the jury to find the defendant not guilty as per the written instruction attached hereto.
>
> Burt A. Crowe,
>
> Attorney for Defendant
>
> (Written notation) Denied."

Thus, the case at bar is identical with the procedural situations presented in the cases of *Slocum* v. *New York Life Insurance Company,* 228 U. S. 364, and *Aetna Insurance Company* v. *Kennedy,* 301 U. S. 389. The facts in the case of *Baltimore & Carolina Line* v. *Redman,* 295 U. S. 654, were entirely different. In that case the court sub-

mitted the facts to the jury and reserved its ruling on the motion for a directed verdict at the close of all the evidence, that is, the case went to the jury with a reservation of the court's ruling on the motions.

Therefore, the Petition for Writ of Certiorari in the case at bar presents a serious question as to the construction of Rule 50(b) of the Federal Rules of Civil Procedure, which problem is still a dilemma to the Federal Courts of the United States, as the petitioner has pointed out in her Petition for Writ of Certiorari and in her Brief in Support of said Petition.

## FAILURE TO FOLLOW ERIE RAILROAD COMPANY VS. TOMPKINS

As pointed out in the Petition for Writ of Certiorari and in the Brief in Support Thereof, the facts in the case at bar presented a conflict in the evidence as to the questions of negligence and contributory negligence. The correctness of this statement is admitted by respondent on page 1 of its Brief, wherein the respondent states: "The statement of the matter involved as set out by petitioner in her brief filed herein correctly states the salient facts as to the cause of action herein." The petitioner has pointed out in her Petition for Certiorari and in her Brief in Support Thereof that the Circuit Court of Appeals for the Seventh Circuit, in its decision, did not follow the common law of the State of Illinois as enunciated by the Supreme Court of the State of Illinois, in accordance with the holding of this Honorable Court in the case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64. In deciding the questions of negligence and contributory negligence, the Circuit Court of Appeals for the Seventh Circuit has thrown the local law of Illinois into a state of

confusion by following a case which was decided by one of the four Appellate Courts of Illinois instead of following the law as decided by the Supreme Court of Illinois, the highest court of the State. The respondent, in its brief, tries to overcome this contention by showing that the Circuit Court of Appeals, although following the decision of the Appellate Court of Illinois, cites the case of *Calvert* v. *Springfield Light Company,* 231 Ill. 290. We wish to call this Honorable Court's attention to the fact that the *Calvert* case is not at all applicable to the case at bar and that, although the Circuit Court of Appeals cited that case, it did not follow it, but, on the contrary, followed the Appellate Court of Illinois.

The common law of Illinois as promulgated by the Supreme Court of Illinois is stated in the cases of *Illinois Central Railroad Company* v. *Keegan,* 210 Ill. 150, and *Blumb* v. *Getz,* 366 Ill. 273, cited and quoted in the Brief of the Petitioner in Support of the Petition for Writ of Certiorari. These cases and the law announced therein were not followed by the Circuit Court of Appeals for the Seventh Circuit, whose decision in the case at bar was directly contrary to the ruling of this Honorable Court in *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64.

## CONCLUSION

It is respectfully submitted that the errors of the Circuit Court of Appeals for the Seventh Circuit, as presented in the Petition for Writ of Certiorari and Brief in Support Thereof and in this Reply Brief, are of such importance as to call for a review and determination of this Honorable Court.

Respectfully submitted,

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